FPC Holdings, Inc. d/b/a Fiber Products *and* David R. Decarlo *and* Robert Zeback. Cases 5–CA–23097 and 5–CA–23119

September 16, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

This case[1] presents the issues whether the judge correctly found that: Section 10(b) of the Act did not bar amendment of the complaint at the hearing to allege violations of Section 8(a)(1) of the Act; the Respondent violated Section 8(a)(1) by several adverse actions taken against the Charging Parties because they engaged in protected concerted activities; and the Respondent violated Section 8(a)(3) and (1) of the Act by terminating the Charging Parties both for engaging in union activities and for engaging in other protected concerted activities.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order. Although we agree with the judge's rejection of the Respondent's 10(b) defense, we find that this issue warrants further explanation in this decision.

The original unfair labor practice charges, filed on October 26 and November 10, 1992, alleged that the Respondent violated Section 8(a)(3) by terminating David DeCarlo and Robert Zeback on October 5, 1992, because of their union activities. The complaint amendments, which the General Counsel offered in a motion to the judge on August 3, 1993, the first day of the hearing, allege that on various dates in May and June 1992, the Respondent violated Section 8(a)(1) by several pretermination acts of reprisal against the two employees because they engaged in protected concerted activities. The amendments also allege retaliation against protected concerted activities, in addition to union activity, as an unlawful reason for discharging the employees.

The Respondent contends that Section 10(b) bars litigation of the amended complaint allegations of 8(a)(1) violations because they are not ''closely related'' to the charge allegations of 8(a)(3) violations. In addition, the Respondent challenges the judge's finding that it unlawfully appraised and reprimanded Zeback ''in May 1992''; it argues that this date is outside the 6-month limitation period, because Zeback's charge was not filed until November 10, 1992.

Redd-I, Inc., 290 NLRB 1115 (1988), identifies factors relevant to a determination whether certain otherwise untimely allegations can be added to a complaint based on their close relationship to a pending timely filed charge. Under this ''closely related'' test, the Board will examine whether the otherwise untimely complaint allegations (1) involve the same legal theory as allegations in the timely filed charges, (2) arise from the same factual circumstances, and (3) entail the same or similar defenses by the Respondent. The judge in this case referred only to the final factor in finding that the additional 8(a)(1) allegations were closely related to the original and timely 8(a)(3) discharge allegations. In light of the Respondent's exceptions to his analysis, we will assess each of the factors in the *Redd-I* test.[2]

First, we find that the additional 8(a)(1) allegations involve the same theory of unlawful retaliatory motivation for adverse employment actions as the original 8(a)(3) discharge allegations. All allegations relate to the same alleged animus and pattern of reprisals against the Charging Parties for their perceived roles in encouraging concerted activities, ultimately including union organizing activity, among the Respondent's drivers.[3] Second, as indicated above, we find that the 8(a)(1) allegations involve earlier events in the same factual sequence as the 8(a)(3) termination allegations. Finally, we agree with the judge that the Respondent would be expected to, and did, raise similar defenses to all allegations. Accordingly, we find in *Redd-I* that the amended complaint allegations are not barred by Section 10(b).

[1] On February 23, 1994, Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] Contrary to the Respondent's contention, we find that the complaint amendments all involve conduct occurring within 6 months of the instant charges. Specifically with respect to Zeback, the record shows that his adverse appraisal was prepared on May 26, 1992, and discussed with him on May 28, 1992. These dates fall within 6 months before the filing of Zeback's charge on November 10, 1992.

Furthermore, the record shows that Zeback and DeCarlo were not aware of the existence of the written reprimands in issue until the unfair labor practice hearing. It is well established that Sec. 10(b) does not begin to run on an alleged unfair labor practice until the person adversely affected by it is put on notice, actual or constructive, of the act constituting it. E.g., *Carpenters Wisconsin River Valley Council*, 211 NLRB 222, 227 (1974), enfd. 532 F.2d 47 (7th Cir. 1976). Therefore, Sec. 10(b) would not bar the complaint amendments relating to the reprimands even if the reprimands were dated more than 6 months before the filing of the unfair labor practice charges.

[3] The fact that the timely filed charge allegations and the amended complaint allegations invoke different sections of the Act does not preclude a finding that they are based on essentially similar legal theories. *Southwest Distributing Co.*, 301 NLRB 954, 956 fn. 7 (1991); *Nickles Bakery of Indiana*, 296 NLRB 927, 928 fn. 5 (1989).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, FPC Holdings, Inc. d/b/a Fiber Products, Inc., Baltimore, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Carol A. Baumerich, Esq., for the General Counsel.
Frank S. Astroth, Esq. (Astroth, Serotte & Rockman), of Baltimore, Maryland, for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. The unfair labor practice charges were each filed against Fiber Products, Inc. on October 26 and November 10, 1992, respectively, by individuals David De Carlo and Robert Zeback, both of whom alleged a discriminatory employment termination from their truckdriver positions on or about October 5, 1992. On January 28, 1993, an order consolidating cases, consolidated complaint and notice of hearing was issued by the Regional Director against Fiber Products, Inc. which alleged the October 5 discharges of De Carlo and Zeback to have been motivated because of their union or other concerted protected activities and thus constituted violations of Section 8(a)(1) and (3) of the Act. No other independent violations of Section 8(a)(1) of the Act were alleged. On February 1, 1993, Respondent filed a timely answer that denied the commission of unfair labor practices by alleging that the terminations were economically motivated.

The trial of this matter was held before me in Baltimore, Maryland, on August 3, 4, 5, 6, and 10, 1993. On the first day of trial, I granted counsel for General Counsel's oral motion on the record to amend the complaint. The motion was reduced to written form and introduced into evidence as General Counsel's Exhibit 6, and the relevant part alleges the following conduct of FPC Holdings, Inc.[1] d/b/a Fiber Products (the Respondent):

> 5. On or about May 26, 1992, and on various dates in or around March, April and May, 1992, Charging Party DeCarlo and Charging Party Zeback engaged in concerted activities with other employees and with each other for the purposes of collective bargaining and other mutual aid and protection by discussing the wage freeze imposed by the employer, the need for new employee uniforms and load bars in the truck among other things.
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> 6. In or around May 1992, Respondent, through the conduct of [Personnel Director] Bonnie Roe, issued a written reprimand to Charging Party Zeback.
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> 7. On or about May 26, 1992, Respondent, through the conduct of [Personnel Director] Bonnie Roe and [Manager] Ike Tyler, extended Charging Party Zeback's probationary period.
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> 8. On or about June 12, 1992, Respondent, through the conduct of [Personnel Manager] Bonnie Roe, issued a written reprimand to Charging Party DeCarlo.
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> 9. In or around August 1992, Respondent, through the conduct of [Personnel Manager] Bonnie Roe, [Manager] Michael Taylor and [Manager] Ike Tyler, selected Charging Party Zeback and Charging Party DeCarlo for lay off.
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> 10. On or about October 5, 1992, Respondent discharged its employees charging Party DeCarlo and Charging Party Zeback.
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> 11. Respondent engaged in the conduct described above in paragraphs 6 through 10 because Charging Party DeCarlo and Charging Party Zeback engaged in the conduct described above in paragraph 5, and to discourage employees from engaging in these or other concerted activities.

The amendment reiterates that De Carlo and Zeback were also discharged on October 5 because of their union activities, i.e., activities on behalf of Teamsters Local Union No. 355. Respondent contends that the amendment allegations as to the earlier alleged conduct are barred from the litigation as untimely under Section 10(b) of the Act. The General Counsel argues that the prior conduct was discovered during the pretrial subpoena process and is necessarily entwined with the litigation of Respondent's motivation for the October 5 discharges and that because of a close factual relationship between the original charge and the amended complaint, its litigation is not barred by Section 10(b). The General Counsel cites in support thereof *Redd-I, Inc*., 290 NLRB 115, 118 (1988); *Embassy Suites Resort*, 309 NLRB 1313 fn. 4 (1992); *Pincus Elevator & Electric Co*., 308 NLRB 684 fn. 2 (1992).

At trial, I ruled that I would allow introduction of evidence of Respondent's past and persisting animus toward De Carlo and Zeback's past concerted protected activities regardless of whether it was timely alleged as an independent violation of the Act. Evidence of such conduct is patently relevant and admissible at the very least as background evidence to explain subsequent motivation.

At the trial, the parties were given full opportunity to introduce all relevant testimony and to examine and cross-examine witnesses. The parties were also afforded opportunity to introduce into evidence documentary evidence which resulted in a mass of exhibits which far exceeded the nearly thousand pages of transcript. The parties also elected to file posttrial briefs, each of which exceeded 60 pages and were received at the Division of Judges on October 15, 1993. Attached to the General Counsel's brief was a multiple page motion to correct numerous errors in the transcript. That unopposed motion is hereby granted.

On the basis of the entire record, including the well-drafted, and by no means prolix, posttrial briefs, I make the following

FINDINGS OF FACT[2]

I. JURISDICTION

At all material times Respondent, a Maryland corporation, with an office and place of business in Baltimore, Maryland

[1] Amended at trial to reflect the correct name of Respondent.

[2] Pursuant to prior mutual agreement, Respondent's revised Exhs. 27 and 28 with stipulated annotations were received by me and inserted into the record on September 29, 1993, as well as the stipula-

(Respondent's facility), has been engaged in the business of supplying various paper and plastic products to food markets and other stores selling food and beverage in the Maryland, Pennsylvania, Delaware, Virginia, and Washington, D.C. areas. During the 12 months preceding the complaint, Respondent, in conducting its business operations, purchased goods and supplies valued in excess of $50,000 directly from points located outside the State of Maryland.

It is admitted, and I find, that at all material times Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is admitted, and I find, that Teamsters Local Union No. 355 (the Union) is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Since its inception in October 1993, Fiber Products, Inc. had engaged in the wholesale distribution of disposable paper and plastic packaging materials such as plastic or paper cups, Styrofoam containers, aluminum containers, and plastic and paper bags to supermarkets and fast food restaurants. It also distributed janitorial supplies including floor care products, mops, brooms, and brushes.

On or about June 15, 1990, Fiber Products, Inc. became a subsidiary of the new holding company, FPC Holdings, Inc., which then also acquired as a subsidiary the similar operation of Thomas Buccheri & Sons. In the fall of 1991, a containerized bulk, 7-Up beverage, soda syrup restaurant, and tavern distribution operation was acquired by FPC Holdings, Inc. from the 7-Up Bottling Company and merged with the Buccheri operation. During the summer of 1992, Fiber Products, Inc. and Thomas Buccheri & Sons, Inc. ceased to exist as distinct operating and corporate entities and were merged into FPC Holdings, Inc. which changed from a holding company to an operational entity, i.e., the Respondent herein.

The former president and principal owner of Fiber Products, Inc., Richard Roe, retained that status and is responsible for Respondent's overall general management. For the past 5 years, his wife, Bonnie Roe, has served as personnel or human resources director with the responsibility for hiring, firing, employee discipline, payroll management, and employment benefits administration.

Subordinate to the Roes were Michael (Mike) Taylor, the warehouse operations manager, and Gilbert (Ike) Tyler, the transportation supervisor. These two managers, often referred to as Mike and Ike, are more directly involved in the day-to-day assignment and direction of work to employees. Of those two managers, Tyler is subordinate to Taylor, but he is directly responsible for assignment and direction of all transportation employees, i.e., route delivery work to employees who deliver preloaded delivery vehicles to specific geographical areas in the greater Baltimore and Washington, D.C. area and even to parts of Virginia, Delaware, and Pennsylvania; backup drivers who do warehouse work with warehouse loaders and unloaders but who substitute for sick, vacationing, or otherwise absent route drivers and ''jockeys,'' i.e., warehouse employees who may be called upon to move a delivery vehicle that had been parked in the lot by a returning driver to the loading area and back during the nighttime loading process so that the vehicle may be loaded for and prepared for the morning delivery departures. All the foregoing manager's supervisory and agency status is admitted by Respondent.

Respondent does not own its delivery vehicles but rather rents several varieties of units from Ryder Transportation or Associated Truck Rental. As a condition of rental, Respondent drivers are obliged to submit themselves for road testing and certification by Ryder. Respondent also sends all new drivers to Ryder upon hire for testing and drug screening at Respondent's expense. The vehicles rented from Associated were essentially smaller 14- to 16-foot trucks at a weight under 26,000 pounds which could lawfully be driven by anyone possessing a standard passenger vehicle class D license. Respondent's rented vehicles of this nature included unit 590, a small cargo van, and unit 617, a 14-foot standard shift truck, utilized in the former Buccheri operation.

By October 1992, Respondent utilized 10 Ryder diesel vans which were 22 feet or 24 feet longer and weighed over 26,000 pounds. These vehicles constituted Respondent's fleet of route delivery trucks, each of which was regularly assigned to a particular driver to serve a particular geographical area. Bonnie Roe's inexplicable, gratuitous denial of the existence of regular ''routes'' or ''route driver'' is contradicted not only by General Counsel witnesses but also the testimony of Tyler. Tyler testified that he assigned the same drivers to the same delivery routes everyday. He also admitted that it was important that the route driver get to cultivate the good will of the regular customers he serviced and to develop a rapport with them. His testimony conflicted with Roe on several important issues. The rental of the same 10 route trucks continued through November and December 1992, with the augmentation for a few days in December of two 24-foot vans. All these route trucks required that the driver possess a class B commercial driver's license (CDL). Ryder additionally rented to Respondent several other specialty vehicles in 1992 and 1993, such as small cargo vans not requiring a class B CDL.

Finally, Respondent also rented in 1992 an extra truck from Associated which it used for special runs or holidays. That truck, unit 108, was a ''MAC'' truck in excess of 26,000 pounds' weight and required a class B-CDL licensed driver and was not used in the regular route delivery work.

Throughout 1992 to the week ending November 6, 1992, Respondent's total employment level ranged from 74 to 75 employees. In 1992, up to the June merger, Fiber Products Inc. operation utilized, at a fairly consistent level, 14 drivers and 13 warehousemen. The Buccheri operation employed three drivers and three warehousemen. After the merger, Respondent employed a peak of 16 drivers and 16 warehousemen in July 1992. In August, it employed 12 drivers and from 15 to 17 warehousemen. From the week ending September 5, 1992, to the week ending October 9, 1992, it consistently employed 13 drivers and 17 warehousemen.

In August and September 1992, 10 of Respondent's drivers were assigned to the fleet of 10 regular route trucks. According to Ike Tyler's testimony and other evidence, they

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tion that G.C. Exhs. 124, 125, and 126, consisting of pay summaries, commence as of January 1, 1992.

consisted of Tim Taylor (Michael Taylor's brother), Rudy Dashiell, Steve Hennigan, Michael Comegys, Ralph (Butch) Clayton, David De Carlo, Robert Zeback, Larry Eiting, and Dan Sarzynski. Another route driver, Marc Hurley, was on extended injury leave and his vehicle and route was being serviced by Joe Hook who had been hired in March 1992. Hook did not complete the probationary period imposed upon new drivers, and sometimes extended by it, until the end of June 1992.

According to Tyler's testimony as an adverse witness for the General Counsel, for the same August to September period of 1992, Respondent employed, as backup drivers, Joe Kindle, Larry Bialek, and Otto Weil. Kindle was hired on September 7, 1992, as a warehouseman. Bialek was hired as a warehouseman in November 1990. Later, he drove some Buccheri trucks. He received his class BCDL and Ryder certification on June 16, 1992. Weil's payroll records indicate a transfer ''from the warehouse'' on February 14, 1992, pay raises to $8.50 per hour from $7.35 on the week ending February 14, 1992, and $9.25 for the week ending May 15, 1992. The $9.25 rate is apparently the rate a nonprobationary driver achieves, as did Zeback when he passed his probation. Bialek had reached that rate in the week ending October 2, 1992, having previously been raised to $8.50 hourly rate on July 14, 1992, and $8 hourly rate the week ending June 17, 1992.

Although Tyler, as an adverse witness, testified that Bialek was a backup driver in September–August 1992, when called later as a Respondent witness, he testified to leading examination that Bialek was a driver prior to the October 5 terminations of De Carlo and Zeback. Bonnie Roe testified that Bialek was a driver by the time of the merged operations. General Counsel witness Tim Taylor referred to Bialek as one of several drivers who attended driver meetings. Although De Carlo characterized Bialek as a driver, he also testified that he was not a regular driver.

With respect to Weil, Zeback in his testimony referred to Weil simply as a driver as of late September 1992. Bonnie Roe testified that Weil was promoted to driver training position as of February 21, 1992. At one point, however, as an adverse witness, she testified uncertainly that he was promoted to a class B CDL driver in October 1992. De Carlo identified Weil as a driver whom he helped train and one of the drivers he notified of a union meeting on late September 1992. Regardless of Weil's and Bialek's status as ''drivers'' or ''back up drivers'' prior to October 5, 1992, it is clear from Tyler's more certain and more credible testimony, as an adverse witness, that they were not regularly assigned to the routes served by the aforedescribed route drivers.

In August and September 1992, the warehouse manager, Donnie Johnson, was also used as a backup driver. Finally, the driver status of Phillip Thomas in August-September 1992 is not entirely clear. He was hired in January 1991 as a warehouseman. Thereafter, he drove a truck for the Buccheri operation through June 1992 until the merger of operations. In the winter of 1992–1993, he worked in the warehouse and drove a nonclass B CDL van and, in June 1993, he became a backup driver. According to Bonnie Roe's testimony, between June 1992 and the following winter, he drove some sort of ''shuttle van.''

For the fiscal year ending October 31, 1990, FPC Holdings, Inc. and its subsidiaries attained a profit of $51,881 from gross sales of almost $14 million. The next fiscal year saw gross sales of nearly $16 million but at a loss of $287,458. For the fiscal year ending October 31, 1992, with gross sales almost as much as 1991, the loss for that year was $136,482. It is undisputed that because of its losses, Respondent instituted an employee wage freeze in June or July 1991. The freeze did not affect raises due at the end of an employee's 90-day probationary period. There were other exceptions. Richard Roe testified that the exceptions were based on individual employee performance. However, Bonnie Roe testified that exceptions were motivated by a desire to meet the demands of the market, i.e., prevailing wages paid by competitors for the same job. As she testified elsewhere, it was difficult to find and hire qualified, drug-free drivers, and driver-warehousemen.

In an attempt to cope with the 1991 losses, Respondent decided to consolidate its operations and to eliminate duplicated functions formerly performed individually by each of its subsidiaries, e.g., sales, merchandising, warehousing, etc. The Buccheri & Sons, Inc. warehouse was located on Franklintown Road in Baltimore about 4 miles from the Fiber Products, Inc. warehouse, on Strickland Street also in Baltimore. Respondent gave the required 270-day lease termination notice to its landlord for the Franklintown warehouse, the lease for which expired June 11, 1992. That warehouse was vacated by June 11, 1992, after a period of transferring equipment and products by a shuttle operation between warehouses. The 7-Up operation warehouse location was changed to a new warehouse leased at Commerce Drive where Respondent also relocated its sales representatives and also stored some bulk paper products. These moves saved Respondent about $32,000 in yearly rent alone. Additionally in June 1992, the Buccheri sales force had commenced a phase-out and was eliminated by October 1992. The Buccheri office staff was eliminated in June 1992. Except for a few Buccheri drivers who were merged into the Respondent operation, most others were laid off. Thus Respondent must have concluded that the abilities and attitudes of its Fiber Products drivers were preferable to the Buccheri drivers it released, at least as of June 1992. Documentary evidence reveals the following: From a total of 82 persons employed by all Respondent operations in November 1991, that number dropped to 77 by January 31, 1992; rose to 80 in March, held steady at 79 through spring; maintained at 74 or 75 through May and June; rose back to 77 by September; and held at 74 from the week ending October 2 to the week ending October 30, 1992. Thereafter, the total employment level held at 66 or 67 well into mid-January 1993. Thereafter, it gradually declined to 59 by mid-June 1993.

Thus, according to the documentary evidence, there was no dramatic drop in total employment immediately at the June 1992 merger or thereafter until the week ending October 9, 1992, after three employees were terminated on October 5, i.e., three route drivers, including De Carlo, Zeback, and the inactive, injured Hurley. The next large exodus occurred not until the week ending November 13, 1992, when eight employees were terminated. It is Respondent's position that De Carlo and Zeback were terminated because of the economic motivation to save costs by reducing the number of drivers it employed and by reducing the number of trucks it rented. As stated in a position letter in the investigation of this case and in its posttrial brief, it does not consider De

Carlo and Zeback to be ''bad employees.'' However, as will be seen below, they were selected for layoff preference because Respondent had perceived their work performance to have been marred by essentially an ''attitude'' problem which it insists was not their sympathetic attitude toward union or concerted protected activities. The General Counsel argues that the evidence will show that they were indeed selected for layoff because of their past concerted, protected activities and because of a newly acquired intent by them for union representation and their embryonic efforts toward that goal which finally snapped the Respondent's tautly stressed tolerance of employee concerted activities. The General Counsel adduced a mass of documentary evidence in the hope of demonstrating that there was no actual reduction in vehicle usage on or shortly after the October 5, 1992 terminations. Of course, even if there were in fact a valid economically motivated reduction in work force and number of vehicles rented, a violation would still lie if De Carlo and Zeback had been selected for layoff in deference to other drivers, especially less tenured and experienced drivers, because of the alleged discriminatees' suspected or actual union and/or other concerted activities engaged in for their own and fellow employees' mutual employment benefit.

B. *Earlier Concerted Activities*

1. Drivers meetings

Monthly drivers' meetings were held at Respondent's Fiber Products facility by Tyler at which safety rules and other topics of interest in the ongoing driver operation were discussed. Other managers attended with varying regularity. There is some dispute as to the actual regularity and frequency of the meetings and as to the obligation of all drivers to attend. The meetings were held usually in late afternoon after drivers finished their runs early in the afternoon, as did other drivers who, for a variety of reasons, also finished their runs early in the day. What is not in dispute nor contradicted is testimony that in spring and summer 1992, the drivers gathered together among themselves prior to these meetings and informally discussed matters of employment conditions which were of mutual concern and complaint. The prime subject was the wage freeze announced by Bonnie Roe at a 1991 meeting. Other matters included the failure of recently hired drivers to be issued uniforms to conserve their own clothing; the inadequate supply of handtrucks available on delivery vehicles; the lack of protective load bars to fasten otherwise loose loads to prevent injury; an incentive program and the general state of equipment; and the manner in which the night warehouse crew loaded the delivery vehicles.

Tim Taylor, Manager Taylor's brother, proved to be one of the most credible and convincing witnesses in this proceeding. He had absolutely nothing to gain by testifying as a General Counsel witness while still employed by Respondent. In fact, he clearly risked Respondent's enmity by so doing, and possibly his brother's displeasure. It was clear from the demeanor of Respondent witnesses, particularly the Roes, and most particularly Bonnie Roe, that being examined under oath by counsel for General Counsel, and for Mrs. Roe even by her own counsel, was viewed with loathing and a seething resentment. Mrs. Roe was most demonstrative in this regard by tone of voice, volubility, and expressive facial and other gestures. Tim Taylor, as did the other General Counsel witnesses, testified with emotional detachment, certainty, conviction, and spontaneity. Taylor, however, was the most composed, fluent, and convincing witness. I credit his undisputed testimony which corroborated the leadership and driver spokesperson role of De Carlo with respect to the informal drivers meeting, the management-held drivers' meetings and subsequent union activity of the drivers.

With respect to the drivers' meetings conducted by Tyler, even Respondent witnesses did not seriously or clearly contradict testimony as to De Carlo's spokesperson function with respect to the voicing other employees' complaints, even when he, himself, did not share the complaint, i.e., he had never been without a uniform but nonetheless raised this complaint to Tyler at these meetings on behalf of other newer drivers who, as with other complaints, had discussed it and who asked him to raise it.

Manager Mike Taylor, although admitting that he did not attend the summer 1992 meetings with frequency, attempted to disparage De Carlo's leadership role by rather weakly testifying that other drivers, whose actual identities he could not recall, also voiced some complaints. In cross-examination, Taylor admitted De Carlo voiced complaints about the absence of uniforms, load bars, and the way Respondent treated the drivers. In redirect, he testified with uncertainty that other employees complained, ''once the gate was opened people would jump on the bandwagon.'' He identified Zeback and Comegys as among those people. Significantly, Manager Taylor testified that he was absent because of his need to attend to the transferring of warehouse operations. Implicit in this testimony is that meetings of drivers were held because their services were not needed for the transfer, at least at that time of day. As will be seen below, one of Respondent's complaints about De Carlo's work which arose in testimony was his alleged absence from regularly mandatory drivers meeting and his reluctance to assist in, or to be available for warehouse transfer work. As a Respondent witness, Manager ''Ike'' Tyler was conspicuously silent on the subject of the discussion of employee complaints at these meetings.

As she was throughout her testimony, as an adverse witness called by the General Counsel, Bonnie Roe was extremely evasive, defensive, and inconsistent even as to subjects that clearly were either not in dispute or were not even that material. One of these was the frequency of her own presence at the Respondent facility during the summer of 1992. At one point, she was even contradicted by Manager Tyler when she first adamantly insisted that she was present ''at least every day'' for, at the very least, 3 hours for the shortest visit, but she insisted she visited far longer most of the time. Manager Tyler testified that during that period of time she had been present for only 1 or 2 days each week for a total of 2 or 3 hours each visit. When she was called as a Respondent witness a few days later, after the Tyler contradiction she changed her earlier testimony by conceding that her actual presence was a matter of contingency.

With respect to attendance at drivers' meetings, as an adverse witness, Bonnie Roe testified that she could not recall whether she had attended all the drivers' meetings. With respect to the production of minutes requested by the General Counsel pursuant to a pretrial subpoena duces tecum, she admitted the prior existence of some but claimed that they had now somehow become displaced or lost by some unknown person. Manager Tyler testified as an adverse witness that it

had been his practice to maintain regular drivers, meeting minutes and to store them in the Respondent's office facility filing cabinet. He further testified that, upon being served with the General Counsel's subpoena, Bonnie Roe came and took possession of all those minutes and took them away to an undisclosed place prior to trial. Bonnie Roe testified vaguely that several employees, including De Carlo, had complained of the wage freeze at the drivers' meetings. According to her, however, driver Butch Clayton ''brought it up as an issue.'' She then added, ''a lot of people complained about it.''

Ultimately, during the trial, Respondent produced minutes of only two management-conducted drivers' meetings. Respondent counsel disclaimed having had possession or knowledge of their whereabouts. In cross-examination, after testifying in direct examination as a Respondent witness, Roe ''absolutely'' denied having received any ''file concerning minutes of drivers' meeting'' from Tyler. She testified that with respect to those meetings held between January 1, 1991, through July 19, 1993, that she had taken notes of those meetings, and she reaffirmed that in cross-examination. Yet, she insisted that she had supplied the General Counsel ''copies of all of the notes of those management meetings,'' i.e., of ''every meeting I attended.'' She explained, ''I take the notes.'' When asked how many meetings she attended, she responded to counsel for the General Counsel: ''Whatever you have there, Carol, is what I've done. What I attended.''

It is clear that more than two meetings had been memorialized by Respondent in minutes, that only 2 minutes were produced pursuant to subpoena, that Respondent gave no rational explanation for the failure to produce that evidence, that Respondent's managers gave contradictory testimony with respect to the issue, and that those notes would verify De Carlo's and other employees' protected activities, the nature of and actual frequency of those meetings, and also revealed whether or not De Carlo or other employees had been absent with any degree of frequency. Because of the lack of credibility of Respondent's witnesses so far discussed and to be discussed further, I cannot accept Respondent's speculation that the subpoenaed documents were inadvertently misplaced. I infer that they contain material corroborative of the General Counsel's witnesses and adverse to Respondent.

2. The Kibbey's Restaurant meeting—Deteriorating relations

On some date on or about August 1991 at 6 p.m., a group of drivers met at Kibbey's Restaurant less than a mile from Respondent's Strickland Street facility. The group consisted of then-employed drivers De Carlo, Ralph (Butch) Clayton, Tim Taylor, Dan Sarzynski, Larry Eiting, and Evelyn Carback. They discussed, inter alia, their mutual complaints concerning the wage freeze, sick leave, the incentive program, payday, handtrucks, and load bars. At the meeting, De Carlo prepared minutes or notes which set forth the specific complaints of each driver, as well as the general complaints of all drivers. That evening he transcribed his notes to written form and later added thereto complaints of other drivers who had not attended but whom he had consulted. Two drivers, Steve Hennigan and Marc Hurley, had promised to attend but failed to do so. The drivers had decided to approach the Union to discuss their concerns but delayed doing so while they waited for Hennigan and Hurley. Having delayed beyond the closure of the union office, they abandoned that plan indefinitely.

De Carlo subsequently drafted and typed out an unsigned letter for all drivers addressed to Richard Roe dated August 26, 1991, which requested a meeting to discuss the above-described complaints. De Carlo placed the letter into Roe's office mail receptacle. A day or so later, the meeting was held and De Carlo took the initiative by explaining to Roe that the drivers had previously met to discuss their employment grievances, and he read aloud to Roe his transcribed notes wherein those complaints were delineated. Roe's reaction was, on the surface at least, benign. He smiled at De Carlo and complimented the unidentified writer of the letter as to its format. Most of the issues discussed at the meeting remained unresolved. However, De Carlo conceded that concessions were made as to sick leave and thus some good resulted. There was no evidence of any immediate retaliation to any of the drivers, and De Carlo characterized Roe's demeanor at the meeting as ''friendly.'' Nor was there any evidence of immediate hostility to De Carlo when he first assumed a spokesperson role for employee complaints at the ongoing drivers' meetings. However, by spring 1992, his employment relationship appeared to have become antagonistic. De Carlo testified that in mid-April 1992, following one of Tyler's drivers' meetings, after ongoing wage freeze complaints were discussed, De Carlo and Bonnie Roe engaged in a conversation outside Richard Roe's office witnessed and corroborated in large part by Zeback. De Carlo's recollection was that he had raised the subject of a long overdue, promised personal wage increase, but that Roe had alluded to the wage freeze and suggested that for him to be excepted, he ought to submit some kind of evidence to warrant it despite the freeze of all other drivers' pay. She suggested he state his position in the form of a letter. De Carlo testified, however, without contradiction, that he pointed out to her that he voluntarily offered to work late to help out the night operators and that he could serve as a driver problem adviser.

Bonnie Roe recalled the incident somewhat differently. According to her, she responded to such a request by him sometime in the spring of 1992[3] by telling him that Respondent was considering the creation of a senior driver position for training purposes and resolution of drivers-warehousemen's interface problems, and that she suggested that he apply by letter application wherein he include suggestions as to the position. Bonnie Roe testified that she also solicited the same application from such long-tenured drivers as Rudy Dashiell, with 18 to 20 years of seniority, and Larry Eiting who was hired in the summer of 1989. De Carlo recalled that the senior driver position was discussed at another occasion.

De Carlo and Zeback testified, uncontradicted by Roe herself, that during that same conversation, while Bonnie Roe assured De Carlo of satisfaction with his work performance and ability to get his job done, Roe warned him that she rated his ''attitude'' to have changed over time and to have sunk to an extremely low level, i.e., rated by her as ''D minus,'' down from a previous ''B plus.'' According to Roe, but denied by De Carlo, she he told him that this attitude

[3] As an adverse witness, she placed it possibly in January. As a Respondent witness, she placed it in February 1992.

was jeopardizing his job. The senior driver position was never effectuated.

Mike Taylor was supposedly standing in the doorway. However, since his cryptic version not only differs from that of De Carlo and Zeback, but even from that of Bonnie Roe, I find it to be of no probative value. Ike Tyler's testimony was so uncertain that he placed the incident in August or September 1992. His hesitant, selective, cryptic account is also unreliable. He recalled that the threat of dismissal was made in reference to De Carlo's attitude.

It is undisputed that De Carlo had never previously been criticized for a poor attitude, but rather he had been complimented by Tyler for his good customer relations. Nor is it disputed that Bonnie Roe did not explain to De Carlo what she meant by ''attitude'' when she spoke to him. Further, Bonnie Roe did not explain why she warned De Carlo that his attitude allegedly jeopardized his job, while simultaneously soliciting his application for a senior job position with a possible pay raise which she also solicited only from other very senior drivers. Indeed, the warning of job jeopardy is totally inexplicable in the context of any version of the conversation. The solicitation of a letter from De Carlo either for a wage raise justification or for senior driver position implies that De Carlo's job performance was of sufficient high quality to warrant a possible pay raise except for the elusive ''attitude'' problem which had become an irritant to Respondent at least by the spring of 1992. Subsequently, De Carlo did submit a letter dated April 29, 1992, wherein he outlined ''extra things I can do to help things run smoother in the future.'' He suggested, inter alia, that he could act as a ''group leader'' to solve drivers' problems and to serve as an informational, reciprocal conduit between drivers and management. The tone of the letter gives no hint that the writer was under fear of losing his job. The letter specifically referenced itself to a conversation with Roe of ''a few weeks ago.'' There was no response to the letter. In cross-examination, De Carlo admitted that Roe asked him why his attitude changed and that he told her it was because of the lack of a pay raise.

3. The Big Boy Restaurant incident

It is De Carlo's uncontradicted, credible testimony that route drivers were permitted discretion as to when or where they were entitled to a lunchbreak during the course of deliveries. Nor is his testimony contradicted that some route drivers had occasionally met at a mutually convenient location where they parked their vehicles and took lunch at one of several restaurants they had frequented in the past, and that Tyler had not only been aware of it but had on one occasion requested that they bring him a certain food item. De Carlo and Zeback differ somewhat as to the permissible length of the lunch hour. De Carlo testified that he was told that he was obliged to take a 45-minute lunch, whereas Zeback testified that he was ''supposed'' to take a one-half hour lunchbreak. Manager Tyler and other Respondent witnesses were silent on the subject of whether or not there was an explicit maximum time limit for lunches. The written disciplinary code does not refer to it. The times drivers finished their deliveries and returned to the warehouse were dependent upon various factors, including the bulk of the load, the extent of deliveries, the time of departure, and not merely the length of their lunchbreaks. The disciplinary code merely refers to a 4 p.m. or later return as a late return for which special notice is required.

On some date probably in or shortly after mid-May 1992, drivers De Carlo, Zeback, Tim Taylor, Clayton, and a fifth driver met for lunch at Bob's Big Boy Restaurant on Route 40. De Carlo recalled that the fifth driver was Joe Hook. Zeback thought it was Dan Sarzynski. Zeback thought the lunch lasted from 45 minutes to 1 hour. De Carlo estimated it at from 1 to 1-1/2 hours long. The only other participant who testified, Tim Taylor, was not questioned about the meeting. Zeback failed to specifically describe the nature of what was discussed at Bob's Big Boy lunch. De Carlo was not too certain whether working conditions were actually discussed but speculated that they were, as was customary, whenever drivers gathered. It is De Carlo's and Zeback's testimony that they had not been instructed on that day nor any other day to return to the terminal at any specific time. There was no explicit contradiction to this testimony although it can be arguably implied from Bonnie Roe's generalized testimony as to the purported need to have trucks returns as soon as possible. Zeback's testimony that he often did not take a lunch is not contradicted, and Bonnie Roe admitted that he had told her of that practice in May 1992.

Respondent's reaction to that Big Boy luncheon is markedly curious, given the past custom of such meetings of which at least Tyler was aware. The chief asserted Respondent complaint, of course, is not the meeting itself but the alleged duration of it. Richard Roe testified that he received a telephone call at his office on some date in May from the manager of the Cash & Carry retail store on Route 40, across from Bob's Big Boy, who told him that four or five of Respondent's trucks had parked across the street for ''an hour or so.'' According to Roe, he then asked Mike Taylor ''to check it out,'' who later reported back to him something he could not recall but to which he instructed Taylor that it was ''his problem'' and to ''handle it.'' He recalled no other conversation with ''anyone'' else about the incident.

Mike Taylor testified that pursuant to Richard Roe's instruction, he decided to investigate and drove to the Big Boy Restaurant and observed four Respondent trucks parked ''on our customer's lot across the road.'' He testified that he did not enter the restaurant nor did he attempt to speak to or otherwise observe the employees. He merely noted the vehicle numbers and, upon returning to Respondent's facility, he verified that the four numbered trucks were, according to records, driven that day by Tim Taylor, De Carlo, Zeback, and Comegys and reported this to Richard Roe. Taylor testified that drivers are ''supposed'' to return their vehicles as soon as possible after delivery completion without speeding. He explained that because some customers open early, the first truck back will return as early as 11 or 11:30 a.m., he ''guessed,'' and the last at about 4 p.m. and that loading crews will estimate the order in which trucks will return for reloading and arrange the loads accordingly on the docks. He explained that if trucks are late, the loading crew will have to work late. He testified to no further need for trucks to have returned as soon as possible on the date of the Big Boy meeting. He also admitted that he did not supervise the drivers directly, i.e., that is Tyler's function.

Tyler testified that he heard about the Big Boy luncheon meeting from Taylor who told him that he, in turn, had been told by Roe that four Respondent vehicles were parked on

Route 40. Tyler, however, testified it was he who identified the drivers from the reported vehicle numbers. Tyler, who is actually responsible for the drivers and their assignments, was totally silent as to the impact, if any, upon his operations on the date of the Big Boy meeting. All of the foregoing managers failed to mention Bonnie Roe's involvement, if indeed any, in the incident at the time of its occurrence or what, if anything, she was told about it.

De Carlo credibly testified, without contradiction, that a couple of days after the Big Boy lunch meeting that he encountered Tyler in his office. Tyler snickered and told De Carlo that he heard that a group of drivers had gathered for lunch at Bob's Big Boy Restaurant. De Carlo testified, without contradiction, that he returned his empty vehicle to the facility the day of the meeting at about 2:30 to 3 p.m. and was not told then that he was late or had violated any company rule. De Carlo also testified, without contradiction, that on occasions he had returned his vehicle very early and at one time he telephoned Tyler to tell him he had finished at 10 a.m. and was told not to return but to find something to do elsewhere. Therefore, he had his vehicle washed at an off-premise location.

Zeback testified, without contradiction, that he returned his vehicle to the warehouse at about 2 p.m. the day of the Big Boy meeting and that, a couple of days later, Tyler mentioned to him that his vehicle was seen parked at the Cash & Carry outlet across from the Big Boy for 2 hours. Zeback testified further, again without contradiction, that he told Tyler that he had been misinformed because it was not a 2-hour lunch and the vehicles were parked at the Big Boy, not the Cash & Carry. He testified, without contradiction, that he had never been told what constituted a ''late'' return nor did Tyler tell him that he had delayed the loading of any truck, but rather merely told him not to take ''too long'' of a lunch. He testified, without contradiction, that neither Tyler nor any other manager instructed him with respect to returning to the warehouse in reference to loading for the next day's delivery. Timecards reveal that during May 1992, a 3 p.m. or later punch-out time for almost all the drivers was very common. The timecards reveal no dates when both De Carlo and Zeback returned at an excessively late hour. The documents reveal occasions when they both returned early enough in the afternoon for second runs.

I find Respondent's reaction to the reports it received regarding the gathering of employees at Big Boy in May to be curious for several reasons. If the supposedly unduly long luncheon meeting had in any way actually impacted Respondent's operation on that day, there is no explanation as to why Taylor simply did not enter the restaurant and order the drivers to return or, at the very least, enter and question them about it. Why all the secretive circumvention and failure of immediate confrontation? Why was there no immediate reprimand? It was only some time later that a Respondent reaction manifested itself.

Zeback had been hired on February 10, 1992, and he was told that his probation would extend for 90 days. On May 26, according to Bonnie Roe, she had executed a personnel performance review form for Zeback, the conclusion of which was an extension of his probation for ''30-60 days'' which reflected that he was informed that he was subject to discharge ''at any time.'' Listed as reasons for the rating were:

> Employee does not meet minimum requirements of the job. Energy—interest level low, does not show much enthusiasm.

She further listed as factors affecting his job performance.

> Employee not self motivated, asks what has to be done, a follower not a leader. 2 hr. lunch unwilling to assume new duties as defined on hire (7-Up driving).

Bonnie Roe testified that she had heard from Managers Tyler and Taylor that Zeback had been taking 2 hour ''lunches'' (plural). There is no evidence to support this testimony of more than one lengthy lunch. She is uncorroborated by Tyler or Taylor. Furthermore, at one point in her testimony, she accused Zeback of having taken a 2-1/2 hour lunch. She testified further that managers Tyler and Taylor had given her information in support of the report a week prior to May 26. She testified also that they reported the Big Boy incident to her. Neither Tyler nor Taylor explicitly corroborated her testimony in this regard. At one point, she testified that she drafted the evaluation. At another point, she testified that ''we'' (presumably Tyler, Taylor and her) drafted the evaluation on the same day, and that she found out what the employees discussed on that same day. Then she testified that she interviewed Zeback on May 28. Bonnie Roe then further testified that she drafted an employee reprimand form for Zeback which reflected the following entry:

> Attendance at a ''Dave De Carlo meeting'' which requested that employees need to get together to discuss ''pay.'' Meeting held during company time. (2 hrs) which is a gross infraction of company policy.

A further entry reads:

> R. Z. admits to being there [with] 4 other drivers. Knows this is against policy and that [it] is grounds for immediate dismissal.

Roe testified that she confronted Zeback in the presence of Tyler on May 28 and discussed the evaluation with him, covering each item point by point. She testified that she discovered the nature of the meeting, and that De Carlo had called it, from Zeback, himself, on the date of that confrontation on May 28, at which time she discussed with him the evaluation form. Her testimony is not exactly clear as to the sequence of the preparation of the reprimand and the confrontation itself. She testified that she prepared the reprimand as a warning to Zeback because his attendance at the Big Boy meeting caused an inability to load trucks during a holiday week at the time of a warehouse merger. Monday, May 25, was the Memorial Day holiday in 1992. The timecards fail to correlate a common tardy return for the Big Boy lunch participants for the week before or after that holiday. As an adverse witness, she had testified that dock employees were actually immobilized and prevented from doing their jobs because of that Big Boy lunch meeting. She did not explain just how this came about. In view of the actual relatively early return by De Carlo and Zeback, it is most improbable. Further, it is uncorroborated by Tyler and unsupported by the timecards. Further, Roe also testified, without corroboration, that the shuttle operation between the two warehouses came to a halt because of the delayed return of the four or five Big Boy luncheon trucks. Manager Taylor not only failed to

corroborate her, but he made no reference to the shuttle operation in relation to the significance of an expeditious return of fulfilled delivery trucks and the Big Boy incident. As noted above, he excused himself from the attendance of meetings of delivery drivers because of his involvement in the shuttle operation, thus implying that those drivers were free to attend such meetings, i.e., they were not involved in shuttle operations. Finally, there was no mention in the reprimand itself of an adverse impact on loading or shuttle operations. Standing by itself, Mrs. Roe's testimony has all the earmarks of an ill thought-out fabrication.

Neither of the managers directly involved with the drivers or warehouse operations testified as to any specific impact of the Big Boy lunch meeting upon Zeback's, De Carlo's, or any other participant's actual return time-loading consequences on that specific date, as noted above. Mike Taylor merely alluded to the general reloading practice without any reference to the shuttle operations.

Respondent witness Tyler testified in a cryptic, reluctant manner that he had ''played a role'' in the written evaluation of Zeback, and he answered ''yes'' to Respondent counsel's suggestion that he was present at the evaluation review. At first, he could only recall that they had discussed Zeback's need to improve unspecified work habits and his ''attitude.'' At further prompting by Respondent's counsel, he testified that they discussed ''troublemakers.'' He explained vaguely that because of Zeback's attitude, he was considered a ''troublemaker.'' Tyler testified to no specific misconduct or examples of poor work performance and was silent as to the impact, if any, of the Big Boy meeting participants' return time upon loading operations. Neither Tyler nor Taylor testified whether or not he had actually reported any such impact to Bonnie Roe, whose own actual supervision of the drivers was remote at best. Tyler could recall nothing further of the May 28 performance review of Zeback. He was silent as to the subject of Bonnie Roe's written reprimand, and his recollection was silent as to any disclosure by Zeback as to who called the Big Boy meeting or what was discussed there.

There is some dispute as to whether Zeback was given an opportunity to read the May 26 performance evaluation. Roe became typically hostile, argumentative, and evasive when questioned by counsel for General Counsel about it and finally admitted she could not recall what she actually told Zeback. Zeback testified that he saw it lying on her lap but it was neither read to him verbatim nor was he given an opportunity to read it. He also testified that the May 28 reprimand was not seen by him nor was he aware of it until the time of this trial. He testified, and Mrs. Roe admitted, that he had been given no prior warnings or reprimands. It is also undisputed that he was not given any subsequent evaluations or reprimands. Zeback's account of the personnel evaluation clashes with Roe's. Unlike Roe, Zeback testified with a demeanor that was confident, straightforward, spontaneous, direct, and particularly impressive in cross-examination. He conceded that she appeared to be looking at the evaluation form as she talked, but what she said to him differs. According to him, she did not discuss the Big Boy meeting nor was there reference to a ''Dave De Carlo meeting.'' According to him, the actual gathering was more of a luncheon than a meeting and he had no idea what a reference to a ''Dave De Carlo meeting'' meant. Zeback testified that he was told by Mrs. Roe that his probation would be extended and the promised 75-cent hourly raise would be deferred because she felt he was not sufficiently familiar with the merchandise being delivered, and ''because I had been seen consorting with troublemakers that [sic] had a bad outlook on the company [and she] wanted to make sure I didn't change how I felt about the company, otherwise, I was ok.'' When he asked her to identify the so-called ''troublemaker,'' she refused. Thus, if anything, Tyler's testimony more closely corroborates Zeback than it does Roe, particularly the troublemaker reference. I credit Zeback over the inconsistent, contradictory, improbable testimony of Respondent's witnesses.

Zeback testified, without contradiction, that despite the proposed probation extension to 30 or 60 days, about 2 weeks later he was promoted to permanent status when Tyler provided him with his proof of insurance coverage and notification to him of a change of status with a commensurate raise. Tyler was silent as to this inexplicable promotion in the face of the alleged written evaluation and reprimand. Bonnie Roe was acutely flustered when questioned about it and was unable to give an intelligible response even when examined by Respondent's own counsel, who struggled to get some kind of response from her. When her attention was directed to the language of the reprimand, which warned of an imminent termination, and the incongruity of a sudden promotion, she first testified, ''his attitude got a little better.'' Then she testified, ''I don't know why.'' At this point, as at numerous points in her examination, she gave every impression of contriving and exaggerating as she went along. A particular example is when she testified without any corroboration as a Respondent witness and embellished Zeback's alleged excessively long Big Boy lunch to be part of a habit stemming from the very beginning of his employment which she had heard from unidentified, admittedly hearsay sources. There is no further explanation as to why Buccheri drivers were laid off and Zeback was retained if there had been any real problem in his work performance. The testimony of Respondent's witnesses thus undermines the probative value of its so-called documentation and raises serious questions of fraudulent production, either as to substance or timing.

Despite the General Counsel's demand for production of all employee reprimands for the material time involved, only two such printed form reprimands issued to employees were produced. One was the foregoing reprimand to Zeback. The other was the only written reprimand ever to have been entered into De Carlo's personnel file and which was dated June 19, 1992. The written entries thereon read as follows:

> confronted of [sic] poor attitude, cooperation, meeting on company time. overall performance severely affected by the above. Job becoming ''at risk.''
> . . . .
> Employee acknowledges he is upset by no pay increase and that his attitude has changed.
> . . . .
> previous verbal warning
> . . . .
> monitor behavior and performance
> . . . .

Like Zeback's reprimand, it was signed by Bonnie Roe. It is undisputed that De Carlo was never shown a copy of the

reprimand nor was he aware of it prior to trial. Bonnie Roe at first testified that De Carlo had not been disciplined for the Big Boy meeting. After she was confronted with the document, she testified that the reference there to ''meeting on company time'' meant the Big Boy luncheon of May which obviously had been perceived by Respondent to be a clandestine meeting ''on company time'' by employees to discuss mutual employment conditions and complaints. It is admitted that no other employees were reprimanded in consequence of the Big Boy meeting. Thus the onus of that concerted activity engaged in at Bob's Big Boy for employees' mutual aid and protection fell upon De Carlo and Zeback, at least as it was perceived and suspected by Respondent's agents.

With respect to the reference in the purported reprimand to De Carlo dated June 12, 1992, the reference therein to a confrontation must refer to the confrontation described above which preceded the April 29, 1992 wage increase justification letter, because there is no evidence of any other oral confrontation regarding attitude or work performance. De Carlo was hired in December 1989 and had been subject to periodic written evaluations. Clearly, these documents are relevant. However, although subpoenaed by the General Counsel, they, like several other relevant and critical documents, were not produced and presumably rest in that mysterious black hole which seems to afflict certain of Respondent's records. De Carlo testified that he was at least aware of one such document after a year of employment which, according to his uncontradicted testimony, was, at Taylor's request, drafted by De Carlo himself and adopted by Taylor. Needless to say, the document was highly praiseworthy. That act by Taylor indicates the high regard that Respondent had of De Carlo's work performance prior to the purported change in his ''attitude.''

4. The alleged August 1992 layoff decisions

The Respondent contends that the October 5 layoffs of De Carlo and Zeback were the consequence of layoff decisions made on August 1992 prior to any known or suspected union activities. The General Counsel argues alternatively that the October layoffs were precipitated by subsequent union activities but that, in any event, if adverse decisions had been made in August, it was because of Respondent's animus to the actual and suspected concerted protected activities of De Carlo and Zeback, as already discussed.

Richard Roe vaguely testified that he instructed his supervisors to reduce costs ''as a common practice.'' He testified that he ''repeatedly'' complained to Manager Taylor that the payroll expenses were too high and that he should lay off employees. He was unable to estimate the dates of these conversations. He ''guessed'' that in October 1992, he instructed Taylor to lay off some drivers and warehouse employees. He did not specify identities nor the number of layoffs he had requested.

Mike Taylor's uncertain recollection of the layoff decision had to be refreshed by a statement of position Respondent's counsel had submitted during the investigation of the case. From this rather questionable point of reference, Taylor was then seemingly able to recall that in August 1992, he and Bonnie Roe had decided to rank employees in layoff preference in order to achieve cost savings at some future layoff calculated to take place on October 1, at the end of what he called the busy season. He testified that it was he and Bonnie Roe who decided to rank the following employees to be laid off, if needed, in the following order: Zeback, De Carlo, Hurley, Comegys, and Tim Taylor. He gave no further explanation or details of the motivation for the decision at that time, i.e., August 1992. Comegys and Tim Taylor were never laid off. Incidentally, De Carlo and Comegys were the only Respondent drivers to possess the highly desirable class A driver's license which enabled them to drive a large 26' to 28' combination tractor-trailer vehicles. It is Tim Taylor's credible and uncontradicted testimony that after the October 5 layoffs at a drivers' meeting, Richard Roe announced a plan to obtain tractor-trailer units, and Tyler later told him to try to get a class A CDL. In cross-examination, he revealed that Tyler had speculated on such possible acquisitions even before the layoffs. De Carlo testified, without contradiction, that Manager Taylor mentioned at more than one drivers' meeting an intention to acquire tractor-trailers. None were actually purchased.

Tyler, who is self-characterized as the drivers' supervisor, failed to testify to any specific input regarding an alleged layoff decision of drivers in August or October 1992.

Bonnie Roe is the only Respondent witness to testify with any semblance of confidence that a layoff ranking of drivers was made precisely in mid-August 1992. She first did so when examined by counsel for General Counsel as an adverse witness. She explained that the actual layoffs were not effectuated until October 5, 1 day into a new pay period, because the drivers' vacation periods and the busy season created a demand for drivers' services. She also conceded that the summer busy season actually ends the third or fourth week of December. Respondent's vacation roster records for 1992 reveal that employees' vacations did not end by October 5 but rather actually occurred later in the month. Furthermore, the record evidence and testimony of Manager Taylor reveal that the last 2 weeks in October and the entire period of time from mid-November to January 1, 1993, was designated by Respondent as a ''no vacation'' period because no drivers could be spared during that busy season when backup drivers are often required. Furthermore, drivers and warehousemen were not permitted to take vacations during the last week in October because of the inventory work done that week. Manager Taylor also conceded that Respondent is extremely busy during the November–December period because of holidays, when backup drivers are called upon to drive ''extra runs.'' Thus Bonnie Roe's testimony that it was more convenient to defer the layoffs to October 5 is contrary to the facts in the record, the testimony of Manager Taylor and Respondent's own records. The vacation period did not end on October 5. Moreover, the fall-winter busy season was just about to begin. Other than that brief conclusionary testimony of Bonnie Roe, there are no details as to exactly who decided to lay off employees and then defer it to October, or what specific rationalization was behind it as of mid-August 1992. It is undisputed that no driver was notified in August or thereafter of the possibility of a future economic layoff. Inexplicably, there is no contradiction whatsoever to De Carlo's testimony that Manager Tyler told him prior to his layoff that customers Shoppers Food Warehouse and Farm Fresh intended to expand their operations and, therefore, De Carlo's work would be expanded.

5. Union activity

According to the composite testimony of De Carlo, Zeback, and Tim Taylor at the very end of September 1992, probably on or about Monday, September 28, a group of drivers met in or just outside Respondent's facility between 5:30 to 5:45 a.m. and discussed the subject of obtaining union representation. The group included De Carlo, Zeback, Comegys, and Tim Taylor. The meeting actually started as three of them were standing around waiting for the necessary paperwork, which had to be checked first and which delayed departure on that busy delivery day. Comegys joined them and heatedly complained about his run and the sequence of his stops that had been prearranged. The discussion then turned to common work and pay complaints, including heavier runs. Tim Taylor described Comegys as most upset and the one who raised the subject of the Union. According to Taylor, De Carlo then assumed the leading role in the discussion. One of the drivers pointed out that De Carlo's brother, Richard, was a union shop steward at the Leonard Paper Company. De Carlo was asked to talk to his brother about getting union representation, i.e., in particular, according to Taylor, to get a union representative to talk to the drivers. De Carlo agreed. As they walked out to the delivery vehicles, they jointly agreed that Tuesday, October 6, would be a convenient time to meet with a union representative and to provide sufficient notification to other drivers.

Although one or more warehousemen were nearby during this discussion, there is no direct evidence that any manager overheard the conversation or that anyone reported it to them. Richard De Carlo was well known to Manager Tyler who had many discussions with him during Richard De Carlo's regular delivery or pickup visits to Respondent's warehouse on behalf of his employer. He was known to other Respondent employees as well. It is undisputed that De Carlo passed on a tip from his brother to Manager Tyler to the effect that a former Buccheri salesperson had secretly retained a Respondent client contrary to an outstanding agreement. The tip resulted in a reward bonus of $25 given to De Carlo on or about June 5, 1992, by Richard Roe himself, i.e., just after De Carlo's job supposedly had been jeopardized by the Big Boy meeting and his alleged ''poor attitude.''

According to the undisputed testimony of the De Carlo brothers, they spoke shortly thereafter about the drivers' union representation decision. Despite past generalized discussions between them in the past, this was the first explicit expression of a desire for union representation effort expressed by De Carlo to his brother. Accordingly, David De Carlo contacted union representative Arthur Jefferson with respect to the inception of organizing efforts at the Respondent's facility and their desire for an October 6 meeting. On September 29, 1992, De Carlo signed an authorization card for representation by the Union. On the same day, Zeback signed another such card at the Union's office where he met with Jefferson and Richard De Carlo. Jefferson testified in corroboration of their activity. As it turned out, these were the only cards Jefferson ultimately received. Jefferson spoke to De Carlo by telephone at that time and explained the necessary procedures for organizing the drivers.

On September 30, Richard De Carlo telephoned his brother with the message that Jefferson would meet with Respondent's drivers on October 6 at 4 p.m. at the union hall which was located in close proximity to Respondent's facility. The next day, Thursday, De Carlo, Zeback, and Tim Taylor passed the word verbally to all the delivery drivers that a union organizing meeting would be held on October 6 at the union hall at the agreed-upon time, and he talked with them about the subject of the meeting. De Carlo spoke to them variously in the warehouse, out on the warehouse parking lot, at the 7-Up warehouse, or on the CB radio. De Carlo testified that these discussions were held overtly in the open areas during the entire work prior to October 5. In fact, he observed Tim Taylor engage openly in such conversation with Hook. However, there is no direct evidence that any of these conversations were overheard by any manager or reported to them. At best, there is Bonnie Roe's admissions that she relies on hearsay and indirect information in forming personnel evaluations, e.g., Zeback, and that she has made it her business to be informed as to the activities on Respondent's facilities, including the conversations, actions and conduct of drivers which she also makes a habit of auditing and observing when she can. In particular, she admitted, ''We were keeping very close tabs on Bob Zeback,'' and admitted overhearing Zeback's conversation. It is not a difficult task because the drivers, for business reasons, are frequently in and out of the ''run room'' which serves as the first line managers' offices of Tyler and Taylor and is located in the front main office of the facility.

The October 6 meeting was aborted after all the drivers bailed out upon hearing of De Carlo's and Zeback's terminations on October 5.

6. The October 5 job terminations

Manager Taylor rendered another of Respondent's uncertain, vague cryptic accounts of a critical event, i.e., the permanent layoffs of De Carlo and Zeback. According to him, there appeared to be no precipitating event for the layoff other than the August determination to defer layoffs to the end of the busy season on October 1. There is no evidence to clearly make Monday, October 5, as the definitive end of the busy season. Furthermore, there is no evidence as to why the decision was previously made to lay off two active drivers and one long-term injured, inactive driver on that precise date nor who previously made it. In any event, according to Manager Taylor, at the end of their runs on Monday, October 5, he called Zeback and De Carlo into his office individually, and in that order, and engaged in much the same conversation with both of them. He claims he told Zeback that in order to cut work, there had to be a layoff and unfortunately he was one of them, to which Zeback ''mumbled or something.'' Taylor testified that the same conversation occurred with De Carlo except De Carlo refused to turn over his vehicle keys until he received his final paychecks.

Because the testimony of De Carlo and Zeback is more detailed and certain than Taylor and not explicitly contradicted and because Taylor, like other Respondent witnesses, suffered from a credibility deficiency discussed elsewhere, I credit the drivers and find the following actually occurred. After completing his run and returning at about 3 p.m., Taylor summoned Zeback to the run room office where, alone, he was told of his permanent layoff because of cutbacks. Upon being asked, Taylor said that Zeback's route was not being cut, and that less senior drivers were being retained because seniority did not matter. When asked if the true reason for the termination was union talk, Taylor did not deny it but

stood mute. Taylor told him that the layoff decision had been made on Friday, September 29. Taylor refused to explain why the drivers had not been informed on Friday. The pay records indicate the weekly pay period ended on Saturday, October 2, 1992. He offered no explanation as to why cutbacks were being made nor what change in business necessitated it. Zeback testified that from his observation, there had been no decline in the amount of delivery loads. As noted above, part of the drivers' complaints was that their loads were being unduly increased and their runs lengthened without an increase in pay.

On October 5, when De Carlo had finished his run, Mike Taylor excused the other drivers from the run room and said to De Carlo, ''I don't know how to tell you this but I have to lay you off.'' Upon being asked by De Carlo, Taylor denied that he was eliminating De Carlo's run, denied that seniority meant anything and claimed that the Company was ''cutting back.'' De Carlo asked for the real reason, and Taylor answered that was all he could say except that Bonnie Roe had stated ''flat out'' that De Carlo ''had to go.'' Taylor told him the layoff was permanent. Neither De Carlo nor Zeback was offered any other job position such as driver/-warehouseman or warehouse jockey at driver pay or less, although driver/warehousemen were admittedly advertised for at length and hired periodically thereafter. These will be discussed more fully hereafter. However, it should be noted that Bonnie Roe attempted to explain the need for placement of ads for ''drivers'' at about the time of the layoffs was because she really wanted to hire driver/warehousemen of whom experienced, drug-free applicants were rare. Therefore, she used the lure of a ''driver'' want ad as a deceptive lure. Despite the questionable plausibility of the effectiveness of such a ploy, it fails to explain why she also placed distinct, separate ads for driver/warehousemen and jockeys.

De Carlo testified that after his layoff he followed the van that he normally drove for over 2 years which continued its same pattern of delivery by Larry Bialek. This contradicts Bonnie Roe's testimony that there was a complete, immediate restructuring of delivery routes at the time of layoff. De Carlo's testimony, however, was not contradicted or rebutted. Bialek continued servicing what had been De Carlo's delivery route. De Carlo further testified, without contradiction, that he engaged in postlayoff telephone conversations with Manager Tyler. De Carlo testified, without contradiction, that he telephoned Manager Tyler and asked him how Bialek was coping and Tyler responded that he was doing ''ok'' but that the Pennsylvania part of the route was a ''little tough.'' Although not alleged as violative conduct in the complaint, other drivers closely identified with the late September union organizing activities also suffered adverse consequences, while those not so closely allied fared significantly better. The formal type evaluations by Mrs. Roe, first seen as applied to Zeback, now surfaced in Respondent's personnel actions and files after the October 5 layoffs. Tim Taylor's formal evaluation dated October 12, 1992, noted, in part, ''complains more than normal—critical of company and others,'' and ''safe driver but behavior attitude undesirable—a candidate for layoff . . . .'' Comegys' evaluation dated October 10,1992, contained the following significant notation: ''generally satisfactory—too concerned of others workload.'' It also concluded:

> Mike was placed on probation on 10/10/92. Attitude and behavior must improve or he will be terminated w no further warning. Also aware that he is next in line for lay off. Work volume good but personal traits need to change. Has never recd. verbal or written warning until this date [hired in 1984].

However, entries dated ''12/6/92'' and ''3/93'' show a remarkable improvement. Other drivers, however, received praiseworthy evaluations, particularly noting good attitude for Weil and the ability to ''learn quickly'' for Joe Hook.

Also, not alleged as a violation, Respondent effectuated wage increases in early October 1992 to drivers Bialek, Clayton, Dashiell, and Hennigan, as Mrs. Roe claimed, to be competitive in the market.

7. Postlayoff operations

Other than De Carlo, Zeback, and the inactive, injured Hurley, no other drivers were laid off. There is no explanation as to why it was determined to stop the layoffs at two active delivery drivers although other drivers were supposedly in jeopardy of layoffs, according to the alleged August decisions. There is no evidence that Respondent calculated a specific dollars-and-cents cost-savings objective when it decided upon the October 5 layoffs. The testimony of its witnesses as to the cost savings is vague and generalized.

The testimony of Bonnie Roe is particularly elusive, evasive, inconsistent, contradictory, if not outright mendacious, as to the immediate impact of the cost savings of the layoffs. She testified that the routes were completely redone. Other uncontradicted testimony and documentary evidence indicate that this was not done, e.g., De Carlo's route remained the same. His vehicle was driven by the backup ''driver in training,'' Bialek, who only in the summer of 1992 had acquired the requisite license for driving a route delivery vehicle. He finished his training, according to Bonnie Roe's admissions, around October 1, 1992, when he received a wage increase. Bialek, except for 1 week of back injury, drove the same vehicle until, in mid-January 1993, he rendered it totally inoperable and unrepairable in an accident after which he was injured, received worker's compensation leave pay, and was consequently placed on probation. The former De Carlo route was thereafter driven by Joe Kindle, a probationary backup driver who fortuitously possessed a class B CDL at the time of hiring on September 7, 1992, about a month after the purported decision was made that it was economically necessary to lay off employees, and particularly drivers.

This vehicle driven by Zeback continued to service the particular route it had been servicing, except it was now driven by Otto Weil who had been hired as a warehouseman and who had obtained a class B CDL in February 1992. Thus, like Bialek, he now became one of the 10 drivers regularly assigned to one of the 10 route delivery vehicles. Hurley was injured and off duty in the summer of 1992 and did not work after the week ending July 17, 1992. His vehicle and route had been assigned to Joe Hook who was hired in March 1992 and who ended his probation by virtue of a raise to an hourly rate of $9.25 for the week ending June 26, 1992. Hook also took over Clayton's route but not until Clayton resigned in March 1993. Eiting also resigned but not until June 1993. Those two were the only subsequent driver

terminations, but they occurred many months after the layoffs and they were voluntary.

Bonnie Roe testified that the laid-off and resigned drivers were never replaced. She testified that ''we needed fewer drivers and warehousemen . . . fewer everybody!'' As already obvious, however, is that De Carlo's and Zeback's positions were filled by drivers who had been hired, as De Carlo and Zeback also had originally been hired, i.e., as backup drivers. Neither De Carlo's route nor Zeback's route was merged with any other route, nor were their vehicles returned to Ryder upon their layoff.

Bonnie Roe testified that the layoffs resulted in a cost-saving because of decreased staff, trucks, gas, and mileage. She estimated savings of 1-1/2 truck rental. When pressed for more specifics such as the dollar amount saved, she responded that she did not know. At one point, she testified that Respondent used temporary employees after the October 5 layoff but, when I questioned her about it, she immediately retracted this testimony.

As already found above, there was in fact no immediate reduction of total employees as of October 5, except for the active driver layoffs. Thus De Carlo and Zeback were not caught in an across-the-board cut in staff as of that specific date. The overall reductions can be seen as attributable to the merger consequences. Hurley had not been able to work as a driver since July. After the layoff of De Carlo and Zeback, Hurley was offered but declined a warehouse job. Only a nonfleet delivery truck was returned to Associated, i.e., truck 108 on October 16, 1992, more than a week and a half after the layoff. The annotation on the rental billing suggests that Ryder was notified only after it had already prepared the prospective October billing, and thus the decision to not retain the vehicle was not made in advance of October 1 but afterward.

Bonnie Roe testified that fewer trucks were needed as an immediate consequence of the October 5 layoffs. Manager Tyler, as a Respondent witness, testified that he immediately used fewer drivers and accomplished this by adding more stock to the delivery trucks. However, Tyler's testimony, as an adverse witness, contradicts not only Roe but his own testimony as a Respondent witness because he conceded that Respondent continued utilization of the same 10 Ryder rental route delivery vehicles until the Bialek accident in mid-January. Respondent's records also verify the continued usage of those vehicles, all of which required a class B CDL driver. The vacancies created by the layoffs of the active drivers were simply filled by drawing upon backup drivers available and promoting them. That conduct incurred upon Respondent the expense of Ryder testing and certification.

According to documentary evidence from the payroll weeks ending January 10, 1992, through February 7, 1992, Respondent employed for its Fiber Products and Buccheri operations 14 drivers and between 16 to 18 warehouse persons. Sixteen drivers and warehousemen each were employed by those operations thereafter until the week ending March 6, 1992. One more driver was added thereafter until the week ending June 12, 1992. Warehousemen started to decline in number the week ending June 5. As of the week ending June 26, there were 13 drivers, but the next week it increased to 16 drivers through the week ending July 17. Warehousemen for that period ranged from 16 to 13 and backup to 16. By the week ending August 7, there were employed by Respondent, for non-7-Up operations, 12 drivers and 17 warehousemen. Although the warehouse complement declined by 1 or 2 persons, the driver complement remained at 12 but increased to 13 the week ending September 5, 1992, when the number of warehousemen went back up to 17. Those figures remained constant through the pay period ending October 9, 1992. Thereafter, for the next 2 weeks, there were 12 drivers and 17 warehousemen. From the weekly pay period ending October 30, 1992, through the period ending January 15, 1993, Respondent employed 11 drivers and 14 warehousemen. For the next 2 weeks, there were 9 drivers and 15 warehousemen. From February 19, 1993, through April 30, 1993, there were 9 drivers but 16 warehousemen. From May 14 through June 11, there were 8 drivers and 14 or 15 warehousemen.

The foregoing survey thus corroborates testimony of a contraction in driver complement in late summer of 1992 following the merger of the Buccheri operation into that of Fiber Products. The figure decreased from a high of 17 drivers and 16 warehousemen to 12 drivers and 17 warehousemen for the first week of August and 15 warehousemen thereafter, Yet, despite the so-called August decision to reduce employment levels, Respondent actually increased the drivers to 13 and warehousemen to 17 all through the period immediately preceding the October 5 layoffs, which were limited to only two active employees, De Carlo and Zeback. The warehousemen complement, which, of course, included backup drivers, remained at 17 until mid-November.

Although Respondent argues that the October 5 layoffs were part of a general attrition of the labor force, it took place within the context of an ongoing effort to hire drivers and driver-warehousemen, as disclosed by the publication in newspapers of want ads for those jobs, placed there by Bonnie Roe.

In late January and early February 1992, Respondent, in an advertisement for drivers, characterized itself as a ''rapidly expanding.'' In an early March 1992 want-ad for ''driver/warehousemen,'' it reiterated that characterization of itself as ''rapidly expanding.'' It reiterated that description again in an April advertisement soliciting drivers. It advertised for driver/warehousemen in mid-May 1992. On June 7, it advertised for drivers, driver/warehousemen, and jockeys. Most significantly, despite the testimony regarding a supposed August decision to reduce the employment complement, including drivers, and despite Richard Roe's testimony of ongoing instructions to cut employment levels, Respondent, through Mrs. Roe, explicitly advertised on August 30, 1992, for a truckdriver to engage in delivery work. That advertisement was inexplicably repeated on October 4, 1992, for a delivery driver for delivery work with a class B CDL. Thereafter, advertisements were placed offering employment for backup drivers or driver/warehousemen who possessed a class B CDL on October 11, October 25, and November 15, 1992. By May 2 and 16, 1993, Respondent was again advertising for ''drivers,'' not driver/warehousemen. And, on June 6 and 27, 1993, it was soliciting employment for drivers explicitly with a class B CDL for delivery work.

That employment solicitation activity by Respondent casts extreme doubt on the claim that its employment level of drivers was due to an intentional effort to keep it low rather than an inability to find enough qualified drivers. Remember, two drivers resigned voluntarily in the summer of 1992. I re-

ject as nonsensical and completely disingenuous Mrs. Roe's explanation that she really intended to lure the hiring of drug-free competent driver/warehousemen by advertising for ''delivery drivers.'' I reject her testimony that Respondent had no need for delivery drivers on or after October 5 as patently false. Driver/warehousemen continued to be hired after October 5, who possessed a class B CDL and who, at Respondent's expense, were sent to Ryder for testing and certification.

8. Noneconomic reasons for layoff selection

There is more to Respondent's defense than economic necessity. It argues, and its witnesses testify, that De Carlo and Zeback were selected for permanent layoff because their employment was unacceptable despite protestations that they were not in fact ''bad employees.''

From Mrs. Roe's testimony, if she were to believed, the trier of fact could only conclude that Respondent considered De Carlo and Zeback to be not ''bad employees'' but, rather, horrible employees. When questioned about her negative opinion of these drivers, she accused them of a variety of essentially attitudinal failings. She accused Zeback of a multitude of ''policy violations,'' almost all of which arose out of the Big Boy luncheon. Engaging in a preposterous casuistry, she contorted that incident to define it as ''unauthorized use of equipment.'' She accused Zeback of not being energetic, of being a ''loafer,'' not a ''team player,'' and of meeting the minimum expectations of the job from the day he was hired. There is no specific evidence, however, as to how these generalizations were translated in the ability or inability to deliver merchandise promptly and without attendant customer problems. There is nothing in his timecards nor was there any specific evidence anywhere in the record that he failed in this task in any way.

Bonnie Roe testified that Zeback was ''insubordinate'' because he, as a former 7-Up backup driver, refused to deliver some 7-Up merchandise. The 7-Up operation is clearly distinct from that of the merged Fiber Products and Buccheri operations. Tyler testified that he asked both Zeback and De Carlo to accept some 7-Up work but they refused. No details were given except that it occurred ''more than once'' in the spring and summer of 1992.[4] From his testimony, we have no idea of the nature of the requests, the forcefulness of it nor the urgency of it, if any, nor whether it had any effect at all on getting the job done. It cannot be determined whether it was a casual permissive-type inquiry, a solicitation for volunteers or something approaching an order. It is certainly not clear that it was an actual assignment of 7-Up delivery work that Zeback and De Carlo refused. As Tyler explained in cross-examination, he did not actually assign any 7-Up work to De Carlo because De Carlo was not a 7-Up driver. Inferentially, we can conclude the same of Zeback who had ceased doing 7-Up backup driving early in his career and was now an FPC driver. However, Mike Taylor testified, without reference to time, date or any specific circumstances, that Zeback ''more than once refused'' to perform 7-Up backup driving. He did not make clear whether Zeback refused a casual, general inquiry, a specific request or something in the nature of an order. Taylor testified in cross-examination that it was Ike Tyler who assigned Fiber Product trucks to Zeback on a daily basis, and he conceded that the circumstances therefore never arose to assign Zeback a 7-Up truck. In light of Respondent witnesses' obtuse, conclusionary, inconsistent, contradictory testimony, I credit Zeback's testimony that after an initial 1-1/2 week of 7-Up backup delivery work, he was never asked to do it again. I credit his testimony that, at most, Manager Taylor mentioned that he might be needed as a backup for an absent 7-Up driver.

Mrs. Roe testified that she observed Zeback loafing and ''gabbing'' with an office clerk several times during his term of employment and was ''amazed'' at his temerity as a new employee when he asked her one time if he needed to stay at the warehouse despite an exceptionally early return from delivery. However, she admitted that she had been aware that he often took no lunchtime despite the fact that there was calculated into his pay a period of 45 minutes of unpaid lunchtime during a delivery run. She admitted that she did not speak to Zeback nor discipline him in regard to the ''gabbing'' with the office clerical. Roe admitted she was not present when Zeback arrived in the morning nor did she check his timecard and thus was not in a position to know whether, in fact, he had already put in his required workday on that occasion.

Mrs. Roe, Taylor and Tyler also accused Zeback of refusing to accept overtime work in the warehouse or to assist in the warehouse moving. Again, their testimony was given without any foundation as to time, date, day of week, nature of the request, or any other circumstance.

Zeback testified that with respect to the work, including overtime work related to the consolidation of the warehouses in the summer of 1992, such work was performed on a voluntary basis and that he and De Carlo, in fact, assisted on several occasions in the Buccheri consolidation. He testified that several drivers, including Hennigan, Dashiell, and Comegys did not ever volunteer. In cross-examination, Tyler denied that Comegys never performed overtime warehouse work but admitted that he, as well as other drivers, refused such work during the summer of 1992 for a variety of reasons, including fatigue or personal problems. He concluded that the timecards reflect overtime work. Comegys' timecards reveal no overtime work at all. Respondent testimony of a refusal to work on a couple of occasions does not necessarily amount to categorical testimony that Zeback never performed extra work. Both Mike Taylor and Bonnie Roe admitted that they did not directly supervise the drivers. In cross-examination, Taylor conceded that he was not certain whether or not Zeback did perform some extra warehouse work during that period. There is no contradiction to Zeback's characterization of that work as voluntary. Zeback's timecards corroborate his testimony that he did, in fact, perform overtime work on several occasions.

The foregoing Respondent testimony regarding all the faults of Zeback that motivated his selection for an economically motivated discharge, including the alleged 7-Up insubordination, clearly predate and supposedly were manifested during the summer of 1992 and were thus extant at the time when Zeback's extended probation was suddenly cut short and he was made permanent and given a pay raise for reasons Mrs. Roe could not explain, except for her feeble muted response that he had rapidly improved his ''attitude.'' Re-

[4] Richard Roe testified that there had not been any interchange between Fiber Product drivers and the two or three 7-Up drivers.

spondent's decision, allegedly made about 1 month later to mark Zeback for permanent layoff for alleged faults that were condoned by his promotion to permanent status and pay raise, is wholly incongruous, illogical, and outright irrational.

Respondent's rationale for the selection of De Carlo for layoff actually exceeds the inconsistency, contradictions, improbability, and irrationalities of those set forth in the foregoing testimony concerning Zeback. De Carlo's employment tenure was much longer. His quality of work performance undisputedly occasioned compliments from his superiors. He was able to achieve an envious and valuable customer rapport, which Tyler conceded other drivers failed miserably. He was rewarded for his tip on a Buccheri salesman. De Carlo was, unlike Zeback, placed on a salaried method of pay based upon a 50-hour workweek. He possessed a class A license at a time when Respondent was considering acquiring vehicles which required such license and when Respondent was encouraging other drivers to acquire such license. It is undisputed that he was one of only a few senior drivers who were selected by Tyler to train new drivers. Indeed, it is admitted that Respondent's dissatisfaction with his services commenced with his perceived change in ''attitude'' in spring and early summer 1992, and which resulted in the unpublished file reprimands of summer 1992 as memorialized in Respondent's file stemming from the ''Dave De Carlo'' meeting at which employees mutually discussed and complained about working conditions, most particularly their wages.

The specific De Carlo performance faults cited by Respondent are as unfounded, generalized, petty, unfocused, and patently contrived as are those of which Zeback was accused. In addition to the same ''attitude'' problem, they allegedly shared the same faults with respect to the nonperformance of 7-Up work. As a Respondent witness, Ike Tyler answered ''yes'' to the leading question as to whether De Carlo was asked to do 7-Up work which he refused. Tyler, however, claimed that De Carlo threatened to quit if he were ever required to do 7-Up delivery work which he protested was too arduous. With respect to warehouse work, he testified again that ''yes,'' he was asked to do this work at some unspecified date, in an unspecified context, during the spring and summer 1992, at which time he refused, but Tyler admitted that De Carlo did help out then, at least ''once or twice.'' As noted above, in cross-examination, he admitted that he did not assign 7-Up duties to De Carlo because De Carlo was not classified as a 7-Up driver, i.e., those duties were not incumbent upon a Fiber Products driver, i.e., paper products, route delivery driver.

Michael Taylor, at best, merely could not ''recall De Carlo assisting in the Buccheri warehouse transition as he could not ''recall'' Zeback doing the same although he asked him to do so. Taylor did not even testify that he actually personally made that request of De Carlo.

From the foregoing generalized, detail-meager context, Bonnie Roe's accusatory testimony took flight. Without any foundation, she testified that De Carlo categorically ''refused'' warehouse work. From that point, she descended to claiming that De Carlo did ''not like'' warehouse work. Thereafter, her complaint was that De Carlo ''when asked . . . seldom participated'' in warehouse work. When pressed for dates, she referred counsel for General Counsel's questions to Taylor. As an initial adverse witness, Roe was called upon to set forth the reasons specifically why De Carlo was selected for layoff. She answered that he had ''attitude problems,'' that he was not a ''team player,'' that he lacked initiative, that he was not cooperative and that she could think of no other reasons. Then she referred to ''policy infractions.'' When pressed to explain, she testified that De Carlo had used ''profane'' and ''threatening language'' in a confrontation meeting in June 1992 with Tyler and herself after De Carlo had claimed that he nearly incurred serious injury from some falling, improperly loaded boxes. She also cited Taylor's report as to the ''two and one half'' hours' Big Boy lunch and the refusal to perform the warehouse and 7-Up work.

As a Respondent witness, she accused De Carlo generally as not energetic. As to the loading negligence confrontation, she testified now that De Carlo was angry and had threatened to sue the Respondent in the future if he ever was injured again and that, after the lawsuit, Respondent would be left with no assets. Tyler's version of the confrontation made no reference to any abusive or profane language or personally threatening language or conduct by De Carlo. Tyler's more moderate recollection was that De Carlo ''complained'' that if he got hurt in the future, he would sue the Respondent for negligence in loading but that De Carlo himself offered to stay after his shift for 1 or 2 days to instruct the loaders in proper loading techniques. The Respondent clearly viewed the incident seriously at the time in that it investigated and actually held a meeting with the loaders to correct their loading habits. However, De Carlo did not attend. Tyler testified that within 2 weeks after the incident, Respondent gave a loading bar to De Carlo and another driver to see if it would help prevent further loads from falling on the drivers. Thus, according to Tyler, Respondent viewed De Carlo's accident and complaint at the time as neither frivolous nor aberrational.

Respondent argues in support of Mrs. Roe's accusation of noncooperative attitude that De Carlo refused to regularly attend mandatory monthly drivers' meetings. As a reticent Respondent witness, Tyler testified without conviction that monthly drivers' meetings were ''mandatory'' and that, in July, De Carlo was absent without excuse at one meeting. According to Tyler, De Carlo later justified his absence by explaining that nothing gets accomplished at the meetings anyway. According to Tyler, Zeback also failed to attend because he had babysitter problems at that late hour when meetings were scheduled. Tyler claimed that he posted advance notices for these meetings. However, Tyler admitted that no absent driver, including Zeback or De Carlo, had ever been reprimanded for nonattendance, just as De Carlo and Zeback had never been reprimanded for refusing to perform 7-Up driving, warehouse work or any other nonroute delivery work they allegedly had been ''requested'' to perform. As an adverse witness, Tyler admitted that on occasions when drivers return very early from their deliveries, they do not want to attend the late afternoon meetings and did not do so. He admitted that he in no way ever disciplined the absent drivers. Rather, he merely met with them individually and summarized for them what had been discussed. That testimony totally undermines his later characterization of those meetings as universally ''mandatory.''

The continuing inconsistencies, contradictions, lack of mutual corroboration of Respondent's witnesses and their gener-

alized, unfounded testimony discredit them, and I credit the more certain, spontaneous, and convincing, detailed testimony of De Carlo and Zeback as to the issues of warehouse, overtime and 7-Up work requisite, as well as the other attitudinal inadequacies and alleged faults described above.

According to the credited testimony of De Carlo, I find the following: As verified by his timecards, De Carlo did perform extra work, including numerous instances of second runs that ended late in the day. As corroborated by Zeback, De Carlo did perform extra work in the warehouse and volunteered, upon Tyler's request, to clean up and remove scrap pallets. He performed this on a monthly basis by use of his personal vehicle (not denied by Tyler). On occasion, De Carlo helped other drivers unload their vehicles, using a forklift truck (not specifically denied). De Carlo also used his own vehicle on occasion to make a special delivery to avoid the costs of using a large truck (not specifically denied). He did perform shuttle runs between warehouses. With respect to the April to June period of warehouse consolidation to Strickland Street, he worked two evenings after completion of his daytime delivery runs and did the same with respect to the Commerce Drive warehouse consolidation. With respect to the 7-Up consolidation, he transferred old machines to the new facility. De Carlo never refused to work extra warehouse duties when asked and never told anyone he would not accept it. Moreover, his testimony is uncontradicted that Tyler told him that some drivers helped but some did not with respect to this extra warehouse consolidation work. For the same critical period of time, driver Comegys' timecards reflect that he did not perform any extra work. De Carlo, at Tyler's request, made special after hours' deliveries of boxed soda syrup on his own time, on his way home to such customers as the ''Bag and Box'' and the A & P Supermarket warehouse (not denied).

With respect to the transfer of 7-Up facilities to the new warehouse, De Carlo assisted in that transition. When the 7-Up operation was first obtained, De Carlo agreed to make the initial run so that he could evaluate it for Richard Roe. De Carlo thereafter explained the details of the run to Roe and explained the need for a special beverage vehicle to accommodate the 7-Up syrup containers which had spilled in the first run (not denied). Roe asked De Carlo to stay late and mop up the spilled syrup, and he did so, in the summer of 1992. De Carlo also explained to Tyler about the need for an appropriate beverage vehicle upon completing a 7-Up delivery to Pennsylvania as requested by Tyler (not denied). De Carlo did not ever threaten to quit if assigned to 7-Up beverage delivery but rather stated that the driver ought to be assisted by a helper. Tyler did not contradict De Carlo's testimony that he told De Carlo that while some drivers refuse any extra work, he could rely on De Carlo to do extra runs or extra work as requested.

With respect to the confrontation after a 40-pound box, part of a load, fell on De Carlo during the course of a delivery run, De Carlo merely complained about the improper loading and lack of load bar. He told Tyler that something had to be done about the loading of the night crew because someone could get seriously hurt and might sue the Respondent. De Carlo did not express anger nor did he curse or use any of the unspecified profanity alleged by Bonnie Roe, but of which Tyler was silent. He did not threaten to sue Respondent as she testified. He was not seriously injured on that occasion. Later that summer, he did sustain a muscle injury during his work duties. Pursuant to Tyler's instructions, he was examined by a doctor who instructed him to perform only light duty for a week. Instead, he performed at least 4 days of his normal delivery duties but missed two drivers' meetings. He did not sue the Respondent nor make any other claim upon it. Given this undisputed testimony, it is most improbable that De Carlo would have reacted as violently as Bonnie Roe described in an earlier less serious incident. It further belies her testimony that De Carlo harbored a hostile, uncooperative attitude toward Respondent.

With respect to drivers' meetings, there was, over the years, an erratic pattern as to their regularity and De Carlo attended the vast preponderance of them. De Carlo did not tell Tyler that he would not attend drivers' meetings because nothing got accomplished. Rather, he asked him whether, at one particular meeting, anything could be accomplished to warrant him waiting around several hours to attend an unpaid meeting on his own time after he finished an early run. He was never told attendance was mandatory and, as Tyler admitted with respect to other early drivers who did not want to attend, he was informed by Tyler the next day of the substance of the meeting.

It is clear that De Carlo was never reprimanded or warned for refusing any work requested of him, about his improper loading complaint or his absence at any drivers' meeting. The only reprimand extant is the one discussed above which, admittedly, was never presented to De Carlo and of which he had no knowledge prior to the trial of this case. From the foregoing findings, the so-called attitudinal faults of De Carlo then take on the character of postdischarge contrivances.

Necessarily, Respondent's explanations for not offering Zeback or De Carlo other work such as backup delivery or warehouse work must be rejected as specious, i.e., they had assumed that because of past refusals, they would not want to accept any other work. Further, it is explained that it was assumed they would not accept the lower paying jobs in the warehouse. Respondent's records reveal past instances of transferring between delivery work and warehouse work by class B CDL possessors. Furthermore, there is evidence that, upon being transferred back to the warehouse, other drivers continued to be paid at the driver rate of pay.

Analysis

For the reasons set forth above, I credit the testimony of the General Counsel's witnesses wherever it conflicts with that of any Respondent witness. I find that Respondent's dissatisfaction with the employment of De Carlo and Zeback is as reflected in its file memoranda of May and June 1992, i.e., the concerted activity engaged in with respect to the mutual discussion of pay and employment complaints and De Carlo's leadership role thereof and Zeback's ''follower'' role which, in Respondent's perception, manifested itself in the watershed event of the May 1992 Big Boy meeting. The documentary evidence is tantamount to an admission that they were punished because of their concerted activities, which, if not tainted by misconduct, would clearly be protected by the Act. *Meyers Industries*, 268 NLRB 493, 497 (1984), and *Meyers Industries*, 281 NLRB 882, 885 (1986), enfd. 835 F.2d 1481, 1482–1483 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

The credible evidence reveals Respondent's attempts to transform De Carlo's and Zeback's concerted activity into an act of misconduct, and to taint the discriminatees' behavior with other unrelated attitude problems to be false and pretextuous. Although I have strong doubts that the Zeback evaluation and his and De Carlo's reprimands actually existed at the time of their surface dates, I conclude that the attempt therein to relate the attitude problems to other nonprotected activities is contrived and mendacious.

Some of Respondent's witnesses' evidence hinted that its displeasure with De Carlo related his individual attitude problem to a rejection of his individual pay raise. However, the overwhelming evidence reveals that, to Respondent's perception, his individual complaint was enmeshed with his spokesperson role on behalf of all drivers' pay and work conditions complaints. Bonnie Roe perceived the Big Boy meeting as a ''Dave De Carlo'' initiated meeting to discuss pay complaints. For reasons known to herself, she identified Zeback, one of four or five attendees, as a De Carlo follower. Indeed, she explicitly characterized him as a ''follower'' in her written evaluation of him. She orally criticized him for having associated with ''troublemakers.'' The only credible evidence of any real ''troublemaking'' is the concerted activities of De Carlo and other drivers which they engaged in for their mutual aid and protection. Zeback, of course, was vulnerable at that time because of his probationary status which was extended at the moment of Bonnie Roe's emotional reaction to his association with De Carlo, but which inexplicably, quickly ended when Zeback's attitude was perceived to have ''improved.''

The original complaint alleges that De Carlo and Zeback were discharged for either union activities or other concerted protected activities. The background hostility and discriminatory treatment of May and June 1992 are clearly relevant to the permanent layoffs of October 5, 1992, as indeed the same motivation is also alleged to have caused it, i.e., concerted protected events are closely related to the October alleged violations. Respondent cites *Redd-I, Inc*., supra, with respect to the necessity to evaluate whether there is a close relationship of pre-10(b) events to justify subsequent consolidation with an outstanding complaint. In that very case, the Board, inter alia, considered whether a respondent would raise the same defenses and therefore would preserve its evidence against otherwise untimely evidence. Clearly, the Respondent's defense as to why De Carlo and Zeback were chosen for layoff, in deference to other drivers, was their alleged attitude and related problems which existed throughout 1992. Prior evaluations, if not adduced by the General Counsel, most certainly would have been preserved for the defense. On that test alone, the May–June allegations are closely related and therefore not untimely alleged.

I conclude that the Respondent's animosity toward De Carlo's and Zeback's concerted protected activities persisted up to and motivated, at least in part, by the October 5 permanent layoffs. In justification of her low evaluations of those drivers which determined their high layoff priority and consequential layoff, Bonnie Roe repeatedly reiterated the Big Boy luncheon meeting and their persisting ''attitude'' problems. The preponderance of evidence thus establishes that De Carlo and Zeback were laid off in October because of their preexisting concerted activities and attitude toward such activities, and that all alleged nonrelated employment problems of attitude or otherwise were false and pretextuous.

The General Counsel alleges and argues that De Carlo's and Zeback's late September union activities also motivated and precipitated the precise timing of the layoffs. There is no direct evidence of Respondent's knowledge of their union activities. However, I conclude that there is abundant evidence to infer its hostility to union representational efforts. The Respondent's is proven to have been hostile to concerted protected activity. Union representation a fortiori is the ultimate form of concerted protected activity. Bonnie Roe admitted to a habit of keeping close observation and auditing of drivers, and most particularly Zeback's onsite activities. She admitted to using hearsay sources upon which to premise employee evaluations. Yet, there is no direct evidence of knowledge of the late September union activities of De Carlo and his past recognized follower in concerted activities, Zeback, upon which Respondent almost immediately reacted to terminate them 1 day into a new pay period, at a very busy time for reasons already found to be pretextuous, and which fortuitously aborted a scheduled union meeting of drivers.

In evaluating the General Counsel's burden of proof, the Board and reviewing Courts have taken into account the difficulty of proving motivational causation, the evidence of which is virtually within the control of or hidden in the mind of the decisionmaker. Confessions of unlawful motivation, or other palpable evidence of such, is rare. Prosecutions more frequently are premised on circumstantial evidence upon which inferences can be made. Accordingly, the Board, with higher Court approval, has determined upon the evidentiary burden of proof as explicated in *Wright Line*, 251 NLRB 1083 (1980), and approved by the Supreme Court in *Transportation Management Corp*., 462 U.S. 393 (1983). In that case, the Board addressed itself to the issue of mixed motivation, i.e., where, as is so often the situation, there exists evidence that a Respondent employer was in part motivated by nondiscriminatory business motivations and, in part, by motivations discriminatory under the Act. The Board in that case held that, henceforth, in all such mixed motivation cases, it would place the burden upon the General Counsel to come forward with evidence that was sufficient to demonstrate that at least in part, the Respondent was discriminatorily motivated. If the General Counsel meets that burden, the Board held, with subsequent Court approval, that the Respondent must thereupon assume the burden of proving that regardless of the presence of unlawful motivation, it would have necessarily engaged in the same decisional conduct because of other lawful nondiscriminatory reasons. The *Wright Line* burden of proof upon General Counsel may be sustained with evidence short of direct evidence of motivation, i.e., inferential evidence arising from a variety of factors, i.e., union animus, timing, pretext, etc. Furthermore, it may be found that where the Respondent's proffered nondiscriminatory motivational explanation is so consummately false, even in the absence of direct evidence of knowledge of and animus toward the protected activity, the trier of fact is constrained to infer unlawful motivation. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). The Board has recently made it clear that it adheres to the *Shattuck Denn* rationale as it has stated in a case of falsity of defense:

> The Board is entitled to infer that the Respondent's true motive was unlawful, i.e., because of the [discriminatee's] protected activity.

See *Williams Contracting*, 309 NLRB 433 (1992).

I find that the facts of this case, which disclose Respondent's animosity of and close scrutiny of De Carlo's and Zeback's past and ongoing concerted protected activities, the overt nature of their union activities, the astonishing timing of their precipitous termination after the union activity, and the falsity of the proffered reason for their selection for layoff mandate a finding that Respondent was aware of and terminated them precisely on October 5, 1992, because of their sudden union activities, if not wholly, then certainly in part for those activities and their past actual and perceived concerted protected activities.

I find that Respondent has established that business reasons may have existed for the justification of a general attrition in the work force. I find that Respondent has not sustained its *Wright Line* burden of showing that De Carlo and Zeback, rather than any other driver, would have been laid off regardless of their union and concerted protected activities. I further find that Respondent's evidence fails to demonstrate that any delivery driver layoffs would have, in any event, occurred precisely on October 5 or that any immediate economic benefits, cost savings in terms of total driver employment hours or vehicle usage were immediately incurred on or shortly after October 5, 1992.

Accordingly, I find that the General Counsel has more than sustained the burden of proof under *Wright Line*, and that the Respondent has violated Section 8(a)(1) and (3) as alleged in the complaint and as amended at the trial.

On the entire record, including the amendments to the complaint, the amended answer and the stipulations of the parties, I make the following

CONCLUSIONS OF LAW

1. As found above in the findings of fact, Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by adversely appraising and reprimanding employee Robert Zeback in May 1992 and by reprimanding employee David De Carlo in June 1992 because of their concerted activities protected by the Act.

3. Respondent violated Section 8(a)(1) of the Act in August 1992 by its designation of the above-named employees to be permanently laid off at a future date because of their concerted activities protected by the Act.

4. Respondent violated Section 8(a)(1) and (3) of the Act on October 5, 1992, by terminating the employment of employees David De Carlo and Robert Zeback because of their prior concerted activities protected by the Act and because of their more recent activities on behalf of Teamsters Local Union No. 355.

5. The above-found unfair labor practices interfere with the free flow of interstate commerce.

REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged employees David De Carlo and Robert Zeback, I recommend that the Respondent be ordered to offer them immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantial equivalent positions, without prejudice to their seniority and other rights and privileges, and to make them whole for any loss of earnings suffered as a result of its unlawful conduct by payment of a sum equal to that which they would have earned absent the discrimination, with the backpay and interest computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also recommend that any reference to their terminations be expunged from their reprimanded employment records.

Having found that Respondent unlawfully and adversely appraised Robert Zeback on May 1992, and unlawfully reprimanded David De Carlo in June 1992, I shall recommend that any reference to those personnel actions be expunged from their employment records.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, FPC Holdings, Inc., d/b/a Fiber Products, Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Adversely appraising, reprimanding, or otherwise disciplining employees or designating them for layoff because of their concerted activities protected by the Act.

(b) Laying off or terminating the employment of its employees or otherwise discriminating against them because of their concerted activities protected by the Act and/or activities on behalf of Teamsters Local Union No. 355 or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Offer David De Carlo and Robert Zeback immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earnings suffered as a result of its unlawful conduct in the manner set forth in the remedy section of this decision, and expunge any reference to their terminations from their work records.

(b) Remove from the work records of David De Carlo and Robert Zeback the unlawful reprimand issued to David De

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Carlo in June 1992, and the unlawful reprimand and adverse appraisal issued to Robert Zeback in May 1992.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Baltimore, Maryland facilities copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT adversely appraise, reprimand, or otherwise discipline employees or designate them for layoff because of their concerted activities protected by the Act.

WE WILL NOT lay off or terminate the employment of our employees or otherwise discriminate against them because of their concerted activities protected by the Act and/or activities on behalf of Teamsters Local Union No. 355 or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL offer David De Carlo and Robert Zeback immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and WE WILL make them whole for any loss of earnings suffered as a result of our unlawful conduct and expunge any reference to their terminations from their work records.

WE WILL remove from the work records of David De Carlo and Robert Zeback the unlawful reprimand issued to David De Carlo in June 1992 and the unlawful reprimand and adverse appraisal issued to Robert Zeback in May 1992.

FPC HOLDINGS, INC. D/B/A FIBER PRODUCTS